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CHAPTER X

DIGITAL TRADE

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1. INTRODUCTION

"Electronic commerce"[1]or "digital trade",[2] as it is now more frequently referred to, has been one of the few areas of international economic law where one can observe patterns of regulatory cooperation and new rulemaking across different venues. It could be argued that electronic commerce is an old trade negotiation topic, and it is only natural that now, over two decades after the adoption of the 1998 Work Programme on Electronic Commerce by the members of the World Trade Organization (WTO),[3] there is some actual progress. Such an assumption of a linear development would however be flawed, as not only the scope and the contents of the topic, but also how governments approach the digital economy have profoundly changed.[4]

This chapter delves into this new complexity. It first shows the transformation of the regulatory topic of digital trade, in particular in the last five years. It then explores the dynamics of digital trade regulation by looking at some discernible trends, as well as at distinct regulatory models endorsed by free trade agreements (FTAs) and the new generation of the Digital Economy Agreements (DEAs). The chapter's inquiry focuses then on recent developments under the umbrella of the WTO and the effort to adopt a new plurilateral agreement on digital trade. The chapter concludes with how the topic of digital trade, as linked to the underlying digitalization processes, is transforming global trade law – with both strands of legal innovation and certain setbacks that are linked to geopolitical differences, on the one hand and to the difficulties of interfacing domestic data governance regimes with commitments in the domain of digital trade law, on the other.

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1 The WTO Work Programme on Electronic Commerce defined "electronic commerce" to be "understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means". See WTO, Work Programme on Electronic Commerce, WT/L/274 (30 September 1998), at para. 1.3. The WTO continues to use "e-commerce" under the Joint Statement Initiative (see WTO, Joint Statement Initiative on Electronic Commerce, WT/L/1056 (25 January 2019)) but in most recent texts uses also "digital trade" as alternative language.

2 While there is no single definition, a joint effort by the IMF, OECD, UN and WTO defines "digital trade", for measurement purposes, as "all international trade that is digitally ordered and/or digitally delivered". See IMF, OECD, UN and WTO, *Handbook on Measuring Digital Trade*, 2nd edn. (2023); also M. Burri and A. Chander, "What Are Digital Trade and Digital Trade Law?" (2023) 117 *AJIL Unbound* 99.

3 WTO (1998), supra note 1.

4 See e.g. S.J. Evenett and J. Fritz, *Emergent Digital Fragmentation: The Perils of Unilateralism* (Brussels: CEPR Press, 2022).

2. FROM ELECTRONIC COMMERCE TO DIGITAL TRADE

The process of adapting trade law to digitalization started early on, as the WTO members launched in 1998 a Work Programme on Electronic Commerce that sought to explore the implications of the Internet for trade in goods, trade in services and the protection of intellectual property (IP) rights. In the two decades since this WTO initiative, much has changed, however. So, while at the outset, electronic commerce was plainly about trading online, new challenges to legal adaptation emerged with the growing importance of global value chains and advanced services trade. While these topics still remain important, policymakers now increasingly focus on a new set of issues of the data-driven economy.[5]

There may be good reasons for this shift: first, it can well be justified by the advanced digitalization, and particularly the critical importance of data to societies. In the context of trade policies, this has translated to ensuring data flows across borders, as data is embedded in a growing number of services and goods and there is a critical interdependence between cross-border data flows and digital growth and innovation – for instance, in the development of artificial intelligence (AI) or the Internet of Things (IoT).[6] The second reason can be linked to a new set of regulatory questions that the use of data and its borderless nature have opened – in particular those around data sovereignty and the protection of privacy, national security and other domestic values and interests.[7] What is apparent in this context, as the chapter discusses below, is that the emerging digital trade law seeks to address these new regulatory issues that go beyond classic WTO topics – such as reduction of tariffs or services liberalization, and targets domestic regimes.

2. DIGITAL TRADE RULEMAKING IN FREE TRADE AGREEMENTS

2.1 Overview

The regulatory environment for digital trade has been shaped by FTAs. Of the 433 FTAs signed between January 2000 and November 2023, 214 contain provisions relevant for e-commerce/digital trade, and 122 have dedicated e-commerce/digital trade chapters,[8] with the significant jump in these commitments occurring in the past few years. Although the pertinent rules are still heterogeneous and differ as to issues covered, the level of commitments and their binding nature, it is evident that

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5 See e.g. M. Burri (ed.), *Big Data and Global Trade Law* (Cambridge: CUP, 2021); S. Peng, C. Lin and T. Streinz (eds.), *Artificial Intelligence and International Economic Law* (Cambridge: CUP, 2021).

6 See e.g. A. Chander, "AI and Trade", in M. Burri (ed.), *Big Data and Global Trade Law* (Cambridge: CUP, 2021), 115.

7 See e.g. M. Burri, "Interfacing Privacy and Trade" (2021) 53 *Case Western Journal of International Law* 35; A. Chander and P.M. Schwartz, "Privacy and/or Trade" (2023) 90 *University of Chicago Law Review* 49.

8 This analysis is based on a dataset of all data-relevant norms in trade agreements (TAPED) administered by the University of Lucerne. For all data, see https://unilu.ch/taped.

the trend towards more and more detailed provisions on digital trade has intensified significantly over the years. The relevant aspects of digital trade governance are spread across the treaties and can be found in: (1) the specifically dedicated electronic commerce/digital trade chapters; (2) the chapters on cross-border supply of services (with particular relevance of the telecommunications, computer and related, audiovisual and financial services sectors); as well as in (3) the IP chapters.[9] This chapter's focus is on the electronic commerce/digital trade chapters and the DEAs that deal exclusively with issues of data economy, as they together have become the source of expansive rulemaking.

The electronic commerce/digital trade chapters play a dual role in the landscape of trade rules in the digital era. On the one hand, they represent an attempt to compensate for the lack of progress in the WTO. In this sense, these chapters address many of the questions of the WTO Electronic Commerce Programme that have been discussed but only inconclusively so. For instance, a majority of the chapters recognize the applicability of WTO rules to electronic commerce[10] and establish an express and permanent duty-free moratorium on electronic transmissions.[11] The digital trade chapters also include rules that have not been treated in the context of the WTO negotiations – the so-called "WTO-extra" issues. One can group these rules into two categories: (1) rules that seek to facilitate digital trade; and (2) rules that address data governance issues. While in the first cluster of issues the number of FTAs that contain such rules is substantial, there is a greater variety in the second cluster, with fewer agreements with rules on data,[12] as well as various conditionalities attached to them.

2.2 Distinct Trends and Models in Digital Trade Rulemaking

There are different ways of mapping the landscape of digital trade rulemaking. Most of the existing enquiries follow a country-based approach and sketch the emergent models of the main stakeholders – the United States (US), the European Union (EU) and China.[13] While this is certainly a valid approach, as the position of key countries matters; yet, with the benefit of hindsight, one can also say that the truly important developments in digital trade rulemaking have unfolded after the 2018 Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP).[14] The CPTPP

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9 For analysis of all relevant chapters, see M. Burri, "The Regulation of Data Flows in Trade Agreements" (2017) 48 *Georgetown Journal of International Law* 408.

10 See e.g. US–Singapore FTA, Article 14.1; US–Australia FTA, Article 16.1.

11 See e.g. US–Singapore FTA, Article 14.3(1); US–Chile FTA, Article 15.3.

12 Thus far only 45 FTAs have rules on data flows and 35 FTAs have rules on data localization.

13 See e.g. H. Gao, "Digital or Trade? The Contrasting Approaches of China and US to Digital Trade" (2018) 21 *Journal of International Economic Law* 297; M. Burri, "Data Flows and Global Trade Law", in M. Burri (ed.), *Big Data and Global Trade Law* (Cambridge: CUP, 2021), 11; M. Burri, "The Impact of Digitalization on Global Trade Law" (2022) 24 *German Law Journal* 551.

14 The CPTPP chapter is identical with the negotiated electronic commerce provisions under the Transpacific Partnership Agreement (TPP), from which the United States withdrew with the start of the Trump administration.

thus serves as a good entry point into the most advanced rules on digital trade. It is also helpful when comparing with subsequent developments in showing what extent parties have decided to go beyond it ("CPTPP-plus" and "CPTTP-extra") or diverge from it ("CPTPP-minus"). Finally in terms of geopolitics, the CPTPP is a suitable starting point because it is a mega-regional treaty with multiple signatories,[15] whose impact has been augmented with the accession of the United Kingdom (UK) and pending applications by a number of countries, such as China, Taiwan, Ecuador and Costa Rica[16]; the CPTPP digital trade model has also diffused in a substantial number of subsequent agreements that bind countries to its implementation.[17]

The CPTPP contains important provisions that seek, on the one hand, to facilitate digital trade by providing a level of interoperability between domestic regulatory regimes and on the other, to curb data protectionism. Illustrative of the first category are the rules on the domestic electronic transactions framework with binding obligations for the parties to follow the principles of the UNCITRAL Model Law on Electronic Commerce 1996 or the UN Convention on the Use of Electronic Communications in International Contracts.[18] The provisions on paperless trading and on electronic authentication and electronic signatures complement this by securing equivalence of electronic and physical forms.[19] Furthermore, in terms of conditioning the domestic regulatory environment, the CPTTP e-commerce chapter includes provisions, albeit in a soft law form, on consumer protection,[20] spam control,[21] net neutrality,[22] as well as on cybersecurity.[23] The CPTPP addresses also the new importance attached to data protection – yet, there seems to be a prioritization of trade over privacy rights, as there is no reference to benchmarks and weaker protection scheme would suffice.[24] This largely reflects the stance of the United States, as the US has (at least thus far) a fragmented privacy protection regime with relatively low standards, which has also been problematic in securing transatlantic data flows.[25]

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15 CPTPP parties are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

16 See J. Schott, "Which Countries Are in the CPTPP and RCEP Trade Agreements and Which Want in?", Peterson Institute for International Economics blog, 27 July 2023, at: https://www.piie.com/research/piie-charts/which-countries-are-cptpp-and-rcep-trade-agreements-and-which-want.

17 See e.g. the 2016 Chile–Uruguay FTA, the 2016 updated Singapore–Australia FTA (SAFTA), the 2017 Argentina–Chile FTA, the 2018 Singapore–Sri Lanka FTA, the 2018 Australia–Peru FTA, the 2019 Brazil–Chile FTA, the 2019 Australia–Indonesia FTA, the 2018 USMCA, 2019 Japan–US DTA, and the 2020 DEPA between Chile, New Zealand and Singapore.

18 Article 14.5 CPTPP.

19 Articles 14.9 and 14.6 CPTPP.

20 Article 14.17 CPTPP.

21 Article 14.14 CPTPP.

22 Article 14.10 CPTPP.

23 Article 14.16 CPTPP.

24 Article 14.8 CPTPP.

25 See Burri, as well as Chander and Schwartz, both supra note 7.

In the second category of data-relevant rules, the CPTPP includes a clear ban on localization measures,[26] a ban on forced technology transfer of source code,[27] as well as a hard rule on free data flows, explicitly including personal information.[28] This is critical and may limit substantially domestic policy space. While certain restrictions are permitted if they do not amount to "arbitrary or unjustifiable discrimination or a disguised restriction on trade" and "impose restrictions on transfers of information greater than are required to achieve the objective",[29] the scope of the exception is not fully clear. While the language appears familiar to trade lawyers in reference to the general exception clauses of Article XIV GATS and Article XX GATT 1994, the CPTPP does not, in contrast to the WTO provisions, provide a closed list of public policy objectives and simply speaks of a "legitimate public policy objective". In addition, there is no GATT or GATS-like qualification of "between countries where like conditions prevail". Some scholars have suggested that the language used is thus closer to the WTO's Technical Barriers to Trade (TBT) Agreement and WTO practice under Article 2 can be useful.[30] Still, there is some uncertainty as to the scope of the exception, which can be inadequate for domestic constituencies, as pointed out by New Zealand's Waitangi Tribunal with regard to the rights of the Māori.[31] It should be pointed out that later agreements, especially EU ones, have added more details to the legitimate public policy objectives test: so, for instance the updated EU–Japan provision on data flows adds in a footnote that: "For the purpose of this Article, 'legitimate public policy objective' shall be interpreted in an objective manner and shall enable the pursuit of objectives such as the protection of public security, public morals, or human, animal or plant life or health, or the maintenance of public order or other similar objectives of public interest, taking into account the evolving nature of digital technologies".[32]

The CPTPP model has been replicated and expanded by subsequent US agreements, which also confirmed for the time the liberal US approach to digital trade, as initiated by its 2001 "Digital Agenda". The renegotiated NAFTA, the "United States–Mexico–Canada Agreement" (USMCA) follows all critical lines of the CPTPP with regard to both the facilitation of digital trade,[33] as well as

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26 Article 14.13(2) prohibits the parties from requiring a "covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory".

27 Article 14.17 CPTPP:

28 Article 14.11(2) CPTPP: "Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person".

29 Article 14.11(3) CPTPP.

30 See e.g. A.D. Mitchell and V. Gyanchandani, "Convergence and Divergence in Digital Trade Regulation: A Comparative Analysis of CP-TPP, RCEP, and eJSI" 19 (2023) *South Carolina Journal of International Law and Business* 98.

31 New Zealand's Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2021), in particular at 132–142.

32 Article 8.81 EU–Japan FTA (as amended by the 2023 Protocol), at footnote 2.

33 The USMCA follows the same broad scope of application (Article 19.2), bans customs duties on electronic transmissions /Article 19.3) and binds the parties for non-discriminatory treatment of digital products (Article 19.4). Furthermore, it provides for a domestic regulatory framework that facilitates online trade by enabling electronic contracts (Article 19.5), electronic authentication and signatures (Article 19.6) and paperless trading (Article 19.9).

with respect to ensuring unhindered data flows.[34] Beyond these similarities, the USMCA goes "CPTPP-plus" in some respects: first, by including "algorithms" in the ban on requirements for the transfer or access to source code;[35] second, by limiting the liability of "interactive computer services" providers for third party content,[36] which secures the application of Section 230 of the US Communications Decency Act – a safe harbour that endorses the First Amendment for platforms but has been recently under attack (even in the United States[37]) in the face of disinformation and other negative developments related to platforms' power.[38] The third and liberal commitment of the USMCA parties is with regard to open government data[39] and seeks to facilitate public access to and use of government information provided "in a machine-readable and open format and can be searched, retrieved, used, reused, and redistributed".[40]

The US approach towards digital trade issues has been confirmed also by the 2019 US–Japan Digital Trade Agreement (DTA), signed alongside the US–Japan Trade Agreement. The treaty replicates almost all provisions of the USMCA and the CPTPP,[41] including the new USMCA rules on open government data,[42] source code[43] and interactive computer services[44] but notably covering also financial and insurance services as part of its scope. It also adds a new provision regarding information and communications technology (ICT) goods that use cryptography, again in an effort to curb forced technology transfer.[45]

While the above enquiries do point to substantial CPTPP-plus developments, this is not true for all stakeholders involved. The EU, for instance, and despite its proactive and comprehensive domestic rulemaking, has been a relatively late mover on digital trade issues.[46] Now that it has defined its

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34 Articles 19.11 and 19.12 USMCA.

35 Article 19.16 USMCA. On the expansion of the scope of the source code provision, see New Zealand's Waitangi Tribunal, supra note 31, at 104–12.

36 Article 19.17(2) USMCA.

37 See e.g. *Gonzalez v. Google LLC*, 598 U. S. ____ (2023) and *Twitter Inc. v. Taamneh*, 598 U. S. ____ (2023).

38 See e.g. M. Burri, "Fake News in Times of Pandemic and Beyond: An Enquiry into the Rationales for Regulating Information Platforms", in K. Mathis and A. Tor (eds.), *Law and Economics of the Coronavirus Crisis* (Berlin: Springer, 2022), 31.

39 Article 19.18 USMCA.

40 Article 19.18(2) USMCA.

41 Article 7: Customs Duties; Article 8: Non-Discriminatory Treatment of Digital Products; Article 9: Domestic Electronic Transactions Framework; Article 10: Electronic Authentication and Electronic Signatures; Article 14: Online Consumer Protection; Article 11: Cross-Border Transfer of Information; Article 12: Location of Computing Facilities; Article 16: Unsolicited Commercial Electronic Messages; Article 19: Cybersecurity US–Japan DTA.

42 Article 20 US–Japan DTA.

43 Article 17 US–Japan DTA.

44 Article 18 US–Japan DTA.

45 Article 21 US–Japan DTA. This rule is similar to Annex 8-B, Section A.3 of the CPTPP Chapter on technical barriers to trade.

46 For overview of this development, see e.g. Burri (2017), supra note 9; Burri (2022), supra note 13.

template,[47] this differs in certain important aspects from the provisions described above, in particular those in the area of data governance. On the one hand, the EU digital trade chapters converge with the CPTPP/USMCA model to cover issues such as software source code,[48] facilitation of electronic commerce,[49] online consumer protection,[50] spam[51] and open government data.[52] On the other hand, they do not include provisions on non-discrimination of digital products and, in reflection of the EU stance on trade and culture,[53] consistently exclude audiovisual services from the scope of the application of the digital trade chapter.[54] Beyond this and critically for the regulation of the data-driven economy, the EU is willing to permit data flows only if coupled with the high data protection standards of its General Data Protection Regulation (GDPR).[55] So while the EU and its partners subscribe to a ban on data localization measures and commit to cross-border flow of data, these commitments are conditioned. The first condition comes from the explicit link made to personal data protection in a dedicated article, which clearly states that: "Each Party recognises that the protection of personal data and privacy is a *fundamental right* and that high standards in this regard contribute to trust in the digital economy and to the development of trade".[56] This is followed by a paragraph on data sovereignty,[57] which permits certain restrictions when it comes to privacy protection.[58]

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47 Representative of the new EU approach are the adopted agreements with the United Kingdom (Trade and Cooperation Agreement, TCA) and most recently with New Zealand, as well as the draft digital trade chapters of the currently negotiated deals with Australia and Tunisia.

48 See e.g. Article 207 EU–UK TCA. The commitment comes with a number of exceptions.

49 See e.g. Articles 205 and 206 EU–UK TCA.

50 See e.g. Article 208 EU–UK TCA.

51 See e.g. Article 209 EU–UK TCA.

52 See e.g. Article 210 EU–UK TCA. The FTA with New Zealand curiously has no provision on open government data.

53 The debate on trade and culture goes back to the Uruguay Round negotiations and in particular the adoption of the GATS. The EU and Canada were of the position that cultural-related services should be covered by trade rules. This is reflected in the flexibilities available under the GATS and as a result the audiovisual services sector is the least committed for. For a discussion, see e.g. M. Burri, "The EU, the WTO and Cultural Diversity", in E. Psychogiopoulou (ed), *Cultural Governance and the European Union* (Basingstoke: Palgrave Macmillan, 2015), 195.

54 See e.g. Article 197(2) TCA.

55 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1 [hereinafter GDPR].

56 See e.g. Article 6(1) draft EU–Australia FTA (emphasis added). The same wording is found in the EU–New Zealand FTA. The EU–UK TCA does not however refer to privacy as fundamental right; this can be however presumed, since the UK incorporates the European Convention on Human Rights (ECHR) through the Human Rights Act of 1998 into its domestic law.

57 See e.g. Article 6(2) draft EU–Australia FTA. The same wording is found in the EU–New Zealand FTA and the EU–UK TCA.

58 For example, Article 8.81(4) EU–Japan FTA states that: "Nothing in this Article shall prevent a Party from adopting or maintaining measures on the protection of personal data and privacy, including with respect to cross-border transfers of information, provided that the law of the Party provides for instruments enabling transfers under conditions of general application for the protection of the information transferred". The attached footnote clarifies further that: "For greater certainty, in line with the horizontal nature of the

A number of other safeguards are included too – such as a review possibility that can be linked to new restrictions,[59] as well as a explicitly stated "right to regulate" covering "legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity".[60] Such a right to regulate, while not automatically "excusing" certain measures is meant to boost the EU's regulatory autonomy.[61]

Despite the fact that selected Asian countries are also members of western-led initiatives, such as the CPTPP and more recently, the Indo-Pacific Economic Framework (IPEF), and that Singapore has become the most prominent legal entrepreneur in digital trade governance with the DEAs (discussed below), the Asian regionalism model of digital trade rulemaking comes with some specificities. In particular, if one looks carefully at the Regional Comprehensive Economic Partnership (RCEP) and the ASEAN E-Commerce Agreement, one sees a more flexible and pragmatic framework that allows developments at different speeds.[62] For instance, while the RCEP includes many of the issues around the facilitation of digital trade, its language is more cautious on data governance issues. So, while the RCEP electronic commerce chapter includes a ban on localization measures,[63] as well as a commitment to free data flows,[64] there are clarifications that protect the RCEP parties' policy space. For instance, the necessity of the implementation of a legitimate public policy measure is to be decided by the implementing party.[65] In addition, a party can take "any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties".[66] In this sense, whereas it can be argued that RCEP does not entail a sufficient level of commitment to opening up for digital trade, it has been argued that this pragmatic and incremental approach should not be viewed as inferior. It can rather be perceived as one that addresses the existing variations in digital development levels across countries, "eventually leading to meaningful consensus-building and long-term engagement in complex areas of digital regulation".[67]

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protection of personal data and privacy, 'conditions of general application' refer to conditions formulated in objective terms that apply horizontally to an unidentified number of economic operators and thus cover a range of situations and cases".

59 See e.g. Article 5(2) draft EU–Australia FTA. The same wording is found in the EU–New Zealand FTA and the EU–UK TCA.

60 See e.g. Article 2 draft EU—Australia FTA. The same wording is found in the EU–New Zealand and the EU–UK TCA.

61 S. Yakovleva, "Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy" 74 (2020) *University of Miami Law Review* 416.

62 See N. Mishra and A.M. Palacio Valencia, "Digital Services and Digital Trade in the Asia Pacific: An Alternative Model for Digital Integration?" 17 (2023) *Asia Pacific Law Review* 489.

63 Article 12.14 RCEP.

64 Article 12.15 RCEP.

65 Article 12.14.3(a) RCEP.

66 Article 12.14.3(b) RCEP.

67 Mishra and Palacio Valencia, supra note 62.

2.2 The New Digital Economy Agreements

Truly innovative in the landscape of digital trade rulemaking and going substantially "CPTPP-extra" has been the new generation of DEAs. So far five such agreements have been agreed upon: the aforementioned 2019 Japan–US DTA; the 2020 Singapore–Australia DEA; the 2020 Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand and Singapore;[68] the 2021 Korea–Singapore DEA and the 2022 UK–Singapore DEA.[69] Despite some variations, the DEAs can be said to share a common template. On the one hand and taking here the example of the DEPA, the DEAs tend to include all rules of the CPTPP and some of the USMCA, such as the one on open government data[70] (but not source code); some of the US–Japan DTA provisions, such as the one on ICT goods using cryptography,[71] have been included too. On the other hand, there are many other, previously unknown to trade agreements, provisions that try to facilitate the functioning of the digital economy and enhance cooperation on key issues.[72] So, for instance, DEPA's Module 2 on business and trade facilitation includes, next to the standard CPTPP-like norms,[73] additional efforts 'to establish or maintain a seamless, trusted, high-availability and secure interconnection of each Party's single window to facilitate the exchange of data relating to trade administration documents'.[74] Parties have also touched upon other important issues around digital trade facilitation, such as electronic invoicing; express shipments and clearance times; logistics and electronic payments.[75] Module 8 of the DEPA on emerging trends and technologies is also interesting to mention, as it highlights a range of key topics that demand attention by policy-makers, such as in the areas of fintech and AI, and discusses the adoption of ethical and governance frameworks that support the trusted, safe, and responsible use of AI technologies.[76] Again going beyond economic issues, the DEPA also deals with the importance of a rich and accessible public domain[77] and digital inclusion.[78] Overall, DEAs provide a flexible platform for cooperation on a number of issues pertinent to the data-driven economy, including also matters that are not necessarily "treaty-ready". Such a flexibility appears attractive, as not only a number of countries, such as South Korea, Canada and Costa Rica, are on the path of joining the DEPA, but also as new DEAs are being negotiated,

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68 With Canada, South Korea and China seeking to join.

69 It should be noted that the DEAs are in most cases linked to an existing or in parallel adopted trade agreement; only in the case of the DEPA, we have a stand-alone agreement.

70 Article 9.4 DEPA.

71 Article 3.4 DEPA.

72 For a comparison of the DEPA with existing FTAs, see M. Soprana, "The Digital Economy Partnership Agreement (DEPA): Assessing the Significance of the New Trade Agreement on the Block" 13 (2021) *Trade, Law and Development* 143.

73 See e.g. Article 2.2: Paperless Trading; Article 2.3: Domestic Electronic Transactions Framework.

74 Article 2.2(5) DEPA.

75 Respectively Articles 2.5, 2.6, 2.4 and 2.7 DEPA.

76 Article 8.2(2) and (3) DEPA.

77 Article 9.2 DEPA.

78 Article 11.2 DEPA.

such as the Digital Economy Framework Agreement among ASEAN states and a DEA between Singapore and Switzerland.

Keeping in mind these advanced FTA rule-frameworks, as well as their specificities, the following section follows the developments in the forum of the WTO.

3. DIGITAL TRADE AT THE WTO

As earlier noted, the WTO membership recognized relatively early the implications of digitization for trade by launching a Work Programme on Electronic Commerce in 1998.[79] This initiative to examine and, if needed, adjust the WTO rules was far-reaching in scope. Yet, it did not include a negotiation mandate and due to various reasons could not bear any fruit over a period of two decades. As a result, WTO law, despite some adjustments through the Information Technology Agreement (ITA), its update in 2015, and the Fourth Protocol on Telecommunications Services, is still very much in its pre-Internet state. This lack of legal adaptation does not however mean that WTO law is irrelevant. First and foremost, WTO regulates all trade, including all services sectors and IP. WTO law also often tackles issues in a technologically neutral way – for instance, with regard to the application of the basic non-discrimination principles, with regard to standards, trade facilitation, subsidies, and government procurement. WTO's dispute settlement mechanism offers in addition an important path to further legal evolution, and a number of cases, in particular under General Agreement on Trade in Services (GATS), have proven helpful in the digital trade domain and clarified WTO law's application.[80] Despite this utility of the WTO's dispute settlement, which has been substantially curtailed in recent years, political consensus on new digital trade rules was lacking. A number of issues remained thus unresolved and exposed the disconnect between the WTO rules and digital trade practices. An example in this context is the critical question of whether previously not existing digital offerings should be classified as goods or services (and thus whether the more binding General Agreement on Tariffs and Trade [GATT 1994] or the GATS apply). Or, if categorized as services, under the scope of which subsector they would fall. This classification is not trivial, as it triggers very different obligations for the WTO Members, the divergence in commitments being particularly radical between the telecommunication and the computer and related services sectors (where commitments are present and far-reaching) and the audiovisual services sector (which is the least committed for sector).

Considering the substantial progress made in preferential venues, especially post-CPTPP as highlighted above, at the beginning of 2019, 76 WTO Members embarked on a new effort to move

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79 WTO (1998), supra note 1.

80 See Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*US – Gambling*), WT/DS285/R, adopted 10 November 2004; Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, adopted 7 April 2005; Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/R, adopted 12 August 2009; Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, adopted 21 December 2009; Panel Report, *China – Certain Measures Affecting Electronic Payment Services (China – Electronic Payment Services)*, WT/DS413/R, adopted 31 August 2012.

towards a digital trade agreement.[81] The negotiations under the so-called "JSI on Electronic Commerce" (JSI) have been co-convened by Australia, Japan and Singapore and conducted through a rounds of talks, plenary and small group meetings in Geneva and virtually during the COVID-19 pandemic. Currently, 90 WTO Members representing over 90% of global trade, all major geographical regions and levels of development, including 5 least developed countries (LDCs), are part of the negotiations. These have also been successful, as it was announced in December 2023 that the negotiations were substantially concluded (although no finalized text has been made public).

As per the latest developments based on the (leaked) negotiation text of Match 2024, it is clear that the scope of JSI is broad and covers a great number of issues of relevance for the regulation of the data-driven economy. These issues have been categorized in the following bundles of topics: (1) Scope and general provisions, including definitions and exceptions; (2) Enabling e-commerce (e-transactions and digital trade facilitation, including e-payments and e-invoicing); (3) Openness and e-commerce (custom duties on e-transmission, access to internet and open government data); (4) Trust and e-commerce (consumer protection, unsolicited commercial electronic messages, personal data protection, ICT products using cryptography and cybersecurity); (5) Transparency, cooperation and development, including capacity building and special and differential treatment; (6) Telecommunications (updating the WTO Reference Paper on Telecommunications Services) and (7) Institutional arrangements and final provisions, including dispute settlement, specific committee and details on accession, amendments, withdrawal and review.

The JSI negotiations can be directly linked to the advanced rulemaking on digital trade in FTAs and largely represent a common denominator of their achievements. This comes with both advantages and a number of setbacks. In the former sense, it appears that FTAs as well as the new dedicated Digital Economy Agreements (DEAs) have worked as regulatory laboratories – not only in terms of mapping the relevant issues but also in terms of treaty language. Yet, the stakeholder positioning, as reflected in these treaties, has also been translated in the JSI negotiations. This has been helpful with regard to agreeing on multiple digital trade facilitation issues. We see important lines of convergence as to the creation of an enabling environment for digital trade that certainly are of value in providing for legal certainty for business and reducing non-tariff barriers to trade. Yet, there are also points of divergence, in particular on the critical issue of cross-border data flow and whether and under what conditions to permit the free flow of data and restrict data localization. In the latter context, while a number of countries align with Japan's proposal for data free flows with trust (DFFT), the policy choices regarding data governance vary widely among the JSI participants and reflect their FTA approaches. Whether real commitments on data flows would materialize appears at this point unlikely, as there has been a recent shift in the negotiation position of one of the most proactive data flows supporters, the United States, as it announced not to further pursue provisions on data

81 WTO, Joint Statement on Electronic Commerce, WT/L/1056, 25 January 2019.

flows, data localization and source code, so as to safeguard policy space for a "digital trade rethink".[82]

The definition of carve-outs and escape clauses to the commitments made will also be critical for the political feasibility of a WTO Agreement on Digital Trade as well as for its normative effect. The conventional reliance on the general and security exceptions (under Articles XX GATT and XIV GATS; Articles XXI GATT and XIV*bis* GATS) is likely to be coupled a broad exception on personal data protection but it is overall unclear how these exceptions will work in practice.

An important aspect that will follow the outcome in the context of the JSI is the legal nature and the means of incorporation of such an agreement into WTO law. The negotiations thus far have evolved as in an "open plurilateral" format without discussing this matter directly, so as not to obstruct the substantive debates. Some countries, in particular, India and South Africa (not parties to the JSI), have expressed strong opposition. They maintain that the JSI negotiations are inconsistent with WTO law, as the outcome of any plurilateral agreement under the WTO legal framework must be adopted by the Ministerial Conference "*exclusively by consensus*".[83] This opposition is linked to the impact of the forthcoming agreement on digital trade, which is hard to subsume exclusively under the GATS and would affect many of the WTO Agreements.[84] The backlash towards far-reaching digital trade rules is related also to discussions about the benefits that less developed countries can extract from an open digital economy and the need to preserve their digital sovereignty. This plays out also in the WTO Work Programme on Electronic Commerce and in particular with regard to the question of whether the WTO moratorium on customs duties on electronic transmissions should be extended.[85] The insufficient involvement of developing and LDCs in the digital discussions could not be softened through the inclusion of provisions on special and differential treatment (SDT) in the JSI that ties its implementation with funding and capacity building mechanisms, as well as provides for longer implementation periods.

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82 See Inside US Trade, "US to End Support for WTO E-commerce Proposals, Wants 'Policy Space' for Digital Trade Rethink", 24 October 2023; USTR, "USTR Statement on WTO E-Commerce Negotiations", USTR Press Release, 24 October 2023.

83 WTO, Legal Status of Joint Statement Initiatives and Their Negotiated Outcomes, WT/GC/W/819, 19 February 2021, at para. 2 (emphasis in the original).

84 For a deeper dive into this debate, see e.g. M. Burri, "A WTO Agreement on Electronic Commerce: An Enquiry into its Substance and Viability" 53 (2023) *Georgetown Journal of International Law* 565; B. Hoekman and C. Sabel, "Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time" 12 (2021) *Global Policy* 49; A.B. Zampetti, P. Low and P.C. Mavroidis, "Consensus Decision-Making and Legislative Inertia at the WTO: Can International Law Help" 56 (2022) *Journal of World Trade* 1.

85 WTO, Declaration on Global Electronic Commerce, WT/MIN(98)/DEC/2 (25 May 1998). The customs duty moratorium has been extended but not made permanent at subsequent WTO Ministerial Conferences. According to the last MC13 Decision, the moratorium is extended until MC14 or 31 March 2026, whichever is earlier. Interestingly, it was decided that the same is true for the WTO Work Programme on Electronic Commerce. See WTO, WTO Work Programme on Electronic, WT/MN824)/W/26/Rev.1 (1 March 2024).

3. CONCLUDING REMARKS AND OUTLOOK

The regulation of the data-driven economy has demanded international cooperation, and this has unfolded not only in preferential forums but also under the umbrella of the WTO. The achievements made in some FTAs and the DEAs are remarkable and there is a strand of legal innovation that seeks to tackle not only the "old" issues raised under the WTO Electronic Commerce Programme but also the newer issues in the context of a global data-driven economy. At same time, as the pertinent issues are highly complex as well as clearly impinging on domestic regimes and the policy space that countries have to adopt measures in the broader domain of data governance, solutions have not been easy. In this sense, the forthcoming WTO plurilateral agreement on digital trade will not entail any major overhaul adding substantial new rights and obligations. Excluding many of the "difficult' issues", it would strive to facilitate digital trade and provide legal certainty for many of the countries and their businesses. This effort is certainly welcome. Yet, it is unlikely to radically reduce regulatory heterogeneity in digital trade rulemaking, as states progress at different speeds and might wish to address newer issues, such as AI or digital identities, through more advanced frameworks – as the DEAs do. Digital trade is likely to remain one of the "busy" areas of global trade law and test the bounds of international cooperation in a complex geopolitical setting.